

**R.D. # 02-03
Jersey City, NJ**

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22**

SOLAR INTERNATIONAL SHIPPING AGENCY, INC.¹

Employer

and

CASE 22-RC-12294

**INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION, AFL-CIO**

Petitioner

DECISION AND DIRECTION OF ELECTION

1. Introduction

Petitioner, International Longshoremen's Association, AFL-CIO, filed a representation petition pursuant to Section 9(c) of the National Labor Relations Act seeking to represent all Marine Operations Vessel Coordinators/ Port Captains (Port Captains) employed by Solar International Shipping Agency, Inc. (the Employer) at its Jersey City, New Jersey and its Maher Terminal, Port Elizabeth, New Jersey facilities, the only facilities involved herein, excluding office clerical employees, guards and supervisors as defined in the Act. Three Port Captains, Chu-Yieh (C. Y.) Chao, Chi-Tsai (C. T.) Hwang and Tai-Chihi (Charlie) Yen are employed in Jersey City and one Port Captain, Henry Chen, is employed in Port Elizabeth. The Union asserts that C. Y. Chao should be excluded from the unit because he is a supervisor. Additionally, in its Post Hearing Brief, the Petitioner in effect amended its Petition to exclude the Port Elizabeth Port Captain, Henry Chen, asserting that he does not share a community of interest with the Jersey City Port Captains. The Employer maintains that the petitioned-for unit is inappropriate because all of its Port Captains are managerial

employees. The Employer also argues that if Port Captains are found not to be managers, the only appropriate unit of Port Captains would include both Port Elizabeth and Jersey City Port Captains, including C. Y. Chao, whom the Employer asserts is not a supervisor.

Based on the following facts and analysis, I find that the Port Captains are not managers, that a unit of Jersey City Port Captains alone is an appropriate unit for purposes of collective bargaining and that C. Y. Chao is not a supervisor. Accordingly, I shall order an election as set forth below.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,² the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.³
3. The labor organization involved claims to represent certain employees of the Employer.⁴
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time Marine Operations Vessel Coordinators/Port Captains employed by the Employer at its Jersey City, New Jersey facility, excluding all office clerical

¹ The name of the Employer appears as amended at the hearing.

² Briefs and Supplemental Briefs filed by the parties have been duly considered.

³ The parties stipulated that during the preceding twelve month period, the Employer purchased and received at its Jersey City, New Jersey facility goods valued in excess of \$50,000 directly from suppliers located outside the State of New Jersey. Accordingly, I find that the Employer is engaged in commerce within the meaning of the Act. *Siemons Mailing Service*, 122 NLRB 81 (1959).

⁴ The parties stipulated and I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

employees, managerial employees, guards and supervisors as defined in the Act, and all other employees.

2. Facts

a. Background

The Employer is a general agent and representative for the North American operations of its principal, Yang Ming Shipping Co. (Yang Ming), a commercial maritime carrier located in Taipei, Taiwan. Yang Ming owns and operates vessels that are used to transport containers of its customers' cargo along certain shipping routes to various ports in Asia, the United States and Europe. It also transports on its vessels containers of other "partner" shipping lines such as Cosco, K Line and Hanjin, pursuant to vessel sharing agreements (VSAs) and Space Charter and Operations Agreements with those shipping lines. Under those agreements, the lines agree to carry each other's containers. Solar manages the movement of Yang Ming's vessels as they move from port to port in the United States and is also involved with making arrangements for the inter-modal transportation of cargo on those vessels by train and truck within the United States. Its Main Headquarters and North Atlantic Regional Headquarters are located in Jersey City. Solar also maintains several other regional offices and port terminal offices throughout the United States. In the New York/New Jersey area, Yang Ming's vessels berth at the Maher Terminal in Port Elizabeth, New Jersey, where Solar maintains an office.

The Employer's Marine Operation Department, located in Jersey City, is responsible for the transportation of vessels and goods at sea to and from various ports. The current organizational chart for this department, incorporating changes announced in November 2002, reflects that Wen Jin (W. J.) Lee, Senior Vice President, manages the department. Reporting to him, among others, are John Chou and C. M. Pao, Assistant Vice Presidents for Marine Operations on the West Coast and East Coast, respectively. Directly under Pao and reporting to him is Deputy Assistant Vice President C. Y. Chao, previously designated as Senior Manager, who is one of the Port Captains involved herein. Organizationally under Chao are Manager Charlie Yen and Acting Manager C. T. Hwang, both previously designated solely as Port Captains and both sought to be represented by the Petitioner. Also working in the Marine Operations Department are clerical employees Tina Lee, designated

as supervisor, Jenny Mach and Cheung Mak. While prior to November 2002 the organization chart reflected that Captain Yen, Captain Hwang, Supervisor Tina Lee, Jenny Mach and Cheung Mak's predecessor were all hierarchically directly under C. Y. Chao, the new chart reflects that Jenny Mach and Cheung Mak report to Chao through Charlie Yen and C. T. Hwang, respectively.

A separate organizational chart exists for the Employer's North Atlantic Region, which includes the approximately nine employees working at the Maher Terminal in Port Elizabeth, among them Port Captain Henry Chen. That chart reflects that Chen reports directly to Operations Assistant Vice President Justin Lee, who works there. Lee, in turn, reports to Paul Gau, Vice President of the North Atlantic Region.

The Employer is involved with the scheduling, stowage planning and port operations involving the vessels of Ming Yang, including the loading and unloading of their cargo at the ports. The Employer contracts with terminals, including the Maher Terminal, for the provision of services, such as the use of berths for docked vessels and the supplying of stevedores and cranes. Additionally, the Employer makes prior arrangements with certain piloting and tugboat companies for their assistance in bringing vessels into and out of berths, when necessary.

b. Port Captains in Jersey City

The record reflects that all of the Employer's Port Captains in Jersey City have received college level training in the marine navigation field. While C.Y. Chao has received a Master's Degree from a maritime university, Charlie Yen and C. T. Hwang have each received a Bachelor Degree. Previously they all had also been Captains of ships

The Port Captains in Jersey City, including C. Y. Chao, are each responsible for particular service lines and the vessels sailing on those lines to various ports on the East Coast. The service lines assigned to a Port Captain may change from time to time.

One of the duties of the Jersey City Port Captains is to prepare stowage plans for vessels in their service lines. Prior to vessels arriving at ports on the East Coast, Port Captains in Jersey City receive Container Booking Forecasts (CBFs) from abroad that indicate the number of containers that are to be loaded at each of the different ports at which the vessels will be berthing. Using this information and the knowledge and experience they

have acquired, Port Captains prepare stowage plans for each port indicating how the cargo is to be loaded onto or unloaded from vessels. Most of the containers transported by vessels are standard sizes. Oversized or awkward cargo, as well as containers that must be refrigerated (known as reefers) may also be transported. Port Captains attempt to load the vessels efficiently and to their maximum capacity, allowing each shipping line the amount of space allocated pursuant to its VSA, while maintaining stability. Stowage considerations include, among others, container size, type, weight, shipping stress and cargo destination.

While Port Captains utilize their experience and judgment to complete the stowage plans, they must follow company policies with respect to their design. Computer software programs are also available to assist Port Captains in preparing these plans.

Port Captains also consider whether cargo that is to be transported is hazardous. If so, they must follow Federal Regulations and internal policies, as well as requirements of the VSAs, as to whether such cargo can be stowed and if so, in what manner.

Stowage plans may also be changed by vessel Captains who, because they have ultimate responsibility for the safety of their vessels, may override decisions of the Port Captains. This may occur, for example, if a vessel Captain believes that a stowage plan creates a stability problem.

The Jersey City Port Captains also receive Long-Term Schedules from Taipei containing expected arrival and departure times for the various vessels at the ports to which they will travel. Based on this information, they prepare more specific Coastal Schedules for vessels expected to arrive at East Coast ports.

In preparing the Coastal Schedules, Port Captains determine the expected amount of time needed to unload or load vessels, factoring in, among other things, the number of containers to be moved, the expected number of stevedore labor gangs and cranes that will be necessary and available to do the moving and the average number of containers that can be moved by each labor gang per hour. They also factor in the effect of tides at each port. Port Captains use their experience and judgment in making these determinations.

Port Captains also order labor and cranes to unload or load vessels after their arrival, as needed. In doing so, they consider the available time, while keeping the vessel on its schedule. It is important that the vessels keep to the Coastal Schedules as much as possible

since they not only affect Yang Ming's cargo but also cargo belonging to Yang Ming's partners under VSAs. Delays significantly increase expenses.

The discretion of Port Captains is limited in many ways with respect to the preparation and potential modification of Stowage Plans or Coastal Schedules. Most importantly, they are limited by the VSAs to which the Employer and other partner lines are signatory. These agreements, which provide for the establishment of additional Working and Operating Procedures for the parties' daily operation and communication with each other, detail the procedures to be followed. Adjustments to Stowage Plans or Coastal Schedules must be made in accordance with the requirements of the VSAs. The VSAs also detail a priority system to be followed by the lines when there is too much cargo to be stowed. The VSAs, Working Procedures and Operating Procedures provide that their terms must be strictly adhered to and that any problems not covered therein shall be solved in good faith through a Central Operating Committee (COC). Major decisions can also be referred to and resolved by a Regional Operating Committee (ROC). Both of these committees consist of representatives from the various partners. Port Captains play no part in negotiating these agreements and procedures.

Pursuant to the VSAs, Port Captains cannot refuse to set aside space in their vessel stowage plans for any party's loaded containers, if it is within that party's slot charter allowance, without the party's consent. With respect to empty containers, the Port Captains are also required to load them to the limit allowed, unless doing so would significantly affect the Coastal Schedules, in which case the empty containers can be left behind.

Stowage Plans and Coastal Plans prepared by Port Captains are normally not reviewed by others. If problems arise with respect to stowage or scheduling, Port Captains can usually resolve them on their own. If Port Captains Yen or Hwang are unsure what to do and need guidance, they may speak with C. Y. Chao. Unusual or difficult problems or issues are brought to Chao's attention. He, in turn, discusses them with his supervisor, C. M. Pao, if necessary. The record discloses an instance when a representative from another shipping line e-mailed Port Captain Hwang requesting permission to significantly change the number of reefer cargo containers on one of the Employer's vessels and suggested that he would attempt to limit the number of empty containers he desired to load as well. Hwang, in turn,

forwarded this e-mail to Chao, who responded by e-mail to the original sender indicating the number of reefers that would be allowed and requiring that he reduce the number of empties to make space. Additionally, the record reflects an instance when Captain Yen consulted with Captain Chao as to what should be done when delays occurred because only two of four assigned cranes were operable. Captain Chao asked Captain Yen what he suggested be done; Chao agreed with Yen's suggestion.

Jersey City Port Captains receive Terminal Departure Reports (TDRs) from company representatives at the ports after a vessel departs. The reports summarize the vessel's activity at the port. Using these reports, the Port Captains compile multi-port statistical analyses.

Port Captains review invoices received covering port, stevedore and terminal charges. They also review invoices prepared by clericals in their department for charges such as assessments and container royalties.

Port Captain Chao is also responsible for booking time slots for vessels on his service for passage through the Panama Canal. The other Port Captains do not have this responsibility. Costly penalties are incurred if vessels miss their scheduled times to pass through the Canal.

c. Alleged Supervisory Status of Port Captain C. Y. Chao

The job description of Port Captain C. Y. Chao, also designated by the Employer as Deputy Assistant Vice President since November 2000, indicates that, in addition to performing the normal duties of a Port Captain he is to "supervise" all matters related to the marine operation department.⁵ Additionally, they also indicate that he is to "supervise" the service lines currently assigned to Captains Yen and Hwang. As noted above, the company hierarchy, evidenced by its most recent organizational chart, shows that Captains Yen and Hwang (as well as clerical employees Tina Lee, Jenny Mach and Cheung Mak, who are not sought to be included in the Unit) work under him. Chao testified that the job he performs is still about 95 per cent the same as that performed by Port Captains Yen and Hwang, but he has some additional administrative duties.

⁵ The job description of Chao's supervisor, C. M. Pao, indicates that he is responsible for supervising nation-wide marine operations and ship repairs.

With respect to the authority of Captain Chao to hire employees, the record reflects that he was present but did not participate in the interview of C. T. Hwang. The interview was conducted by two of Chao's superiors. Chao signed a form recommending that Hwang be hired as a new employee and his superiors, who conducted the interview, agreed. One signing "reviewed by" and the other signing "approved." The initial salary was determined and noted on the form by one of Chao's superiors. Chao played no part in determining the salary. Chao also signed a form three months later indicating that Hwang had successfully completed his probationary period and recommending that he be retained. A performance self-evaluation was attached which Chao had asked Hwang to complete. Hwang assigned himself an overall performance rating and listed areas of the job in which he thought he could improve. Chao's then supervisor completed another section of the evaluation, which lists actions to be taken to meet any needs for improvement. While Chao signed under the designation "immediate supervisor," two of his superiors signed under designations "reviewed by" and "approved."

A July 2001 e-mail to employees in the Marine Operation Department notified them that Captain Chao had been recently assigned as manager of that department and that all requests for leave were to be submitted to him for approval/review. The record disclosed instances when Captains Yen and Hwang submitted to Captain Chao requests for leaves of absence because of a doctor's appointment and vacation, respectively. The requests indicated who would be covering for them in their absences. Captain Chen signed the requests, apparently indicating that he had no objection. The requests were then submitted to C. M. Pao for his approval. In Pao's absence, Chao can approve such requests if they are not for long durations. Chao testified that he has never refused a request for leave.

Captain Chao will, on occasion, substitute for C. M. Pao, in his absence. It does not appear that this occurs with any regularity.

The record reflects that since becoming Deputy Assistant Vice President in November 2002, Captain Chao is expected to prepare annual evaluations of Captain Yen, Captain Hwang and Clerical Supervisor Tina Lee. He has not yet performed this function. Once completed, these evaluations will require review by Captain Chao's supervisor. There is no evidence that Chao has the authority to or has ever fired, transferred, suspended, laid off, recalled, promoted, rewarded, disciplined or adjusted the grievances of any employees or recommended such action.

All Jersey City Port Captains receive a monthly salary. The highest paid Port Captain is Captain Yen, who earns \$720 more per month than Captain Chao. Captain Yen has about 12 years more seniority with the Employer than does Captain Chao. The lowest paid Port Captain in Jersey City is Captain Hwang, who earns \$425 less per month than Chao. Hwang has about one year less seniority than Chao.

d. Port Captain Henry Chen

As noted above, while the Port Captains in Jersey City work for the Marine Operations Department, Henry Chen works for the North Atlantic Region at the Maher Terminal in Port Elizabeth. The Maher Terminal is located about 18 miles from the Employer's Jersey City facility. While Captain Chen has received training in marine navigation, unlike the other Port Captains, he has not received a college degree.

Captain Chen is supervised separately from the other Port Captains. He reports to Assistant Vice President of Operations Justin Lee, who manages the Employer's operations at the Maher Terminal. Lee is the person who evaluates Chen's performance and must approve Chen's requests for time off. Also working at the Maher Terminal are about nine other employees, who similarly report to Justin Lee.

The functions performed by Captain Chen are different from those performed by the Port Captains in Jersey City. Unlike the Jersey City Port Captains, Chen prepares neither stowage plans nor coastal schedules. At Maher Terminal, he oversees the loading and unloading of vessels by stevedores and deals directly with the stevedoring service if problems arise. He also is involved with the husbanding of the vessels. Additionally, Chen arranges services for crews, such as medical care and transportation.

Captain Chen routinely checks the containers in the terminal's freight yard. These include oversize, overweight and hazardous cargo, which he inspects to insure that their condition is suitable for loading and if so, that they will be properly secured. Chen is also involved with the consolidation of freight into containers shared by different companies. Captain Chen must contact and check with employees in the import, export, documentation and equipment control departments to receive appropriate loading and unloading documentation.

The record reflects that Captain Chen very rarely goes to the Employer's Jersey City facility. Port Captains in Jersey City also rarely come to the Maher Terminal and then, only if there is a serious problem with a vessel that requires their immediate attention. Port Captains in

Jersey City transmit to Chen their stowage plans and the estimated time of the arrival of their vessels. Captain Chen contacts Jersey City Port Captains and notifies them of any conditions of work or incidents that may cause a vessel to depart late and affect the Coastal Schedule. Chen also gets information from Jersey City Port Captains necessary for the performance of his duties; they also contact him if he has information that they need. The contact between Jersey City Port Captains and Captain Chen increases when their vessels are berthed at the terminal. Chen testified that on occasion he speaks to Jersey City Port Captains as frequently as ten times a day.

Chen also orders pilots and tugboats to bring vessels into port, but he does so according to company directives. Captain Chen will routinely notify federal agencies, such as Immigration, Customs, Agriculture and the U.S. Coast Guard, when vessels arrive.

When vessels leave, Chen prepares Terminal Departure Reports (TDRs) that he submits, as do husbanding agents at other ports, to Port Captains in Jersey City. As noted above, the Port Captains in Jersey City use this information to prepare statistical analyses. Chen also reviews stevedoring invoices, which are subsequently also reviewed by the Jersey City Port Captains.

The record reflects that, like the other Port Captains in Jersey City, Chen receives a salary. Although he has worked for the Employer since 1988, he earns \$45 per month less than Port Captain Hwang, the lowest paid Port Captain in Jersey City, who began working for the Employer in 2000. Further, while the Port Captains in Jersey City normally work about 40 hours per week, it is not unusual for Captain Chen to work as many as 60-70 hour per week when there are ships in port.

All the Employer's employees are entitled to the same benefits, such as holiday pay, vacation pay, health insurance coverage, 401(k) entitlement and sick leave. These benefits are described in a Handbook that all employees receive. Additionally, all personnel records for the Employer's Main Headquarters and North Atlantic Region, which includes the Maher Terminal, are kept at its Jersey City location.

3. Managerial Status of Port Captains

Although the Act makes no specific provision for managerial employees, under Board policy, this category of personnel has long been excluded from coverage under the Act. *Ladies Garment Workers v. NLRB*, 339 F.2d 116, 123 (2d Cir. 1964); *Palace Dry Cleaning Corp.*, 75 NLRB 320 (1947); *Ford Motor Co.*, 66 NLRB 1317 (1946).

In *NLRB v. Yeshiva University*, 444 U.S. 672 at 682-683 (1980), the Supreme Court

described managerial employees as follows:

Managerial employees are defined as those who “formulate and effectuate management policies by expressing and making operative the decisions of their employer.” These employees are “much higher in the managerial structure” than those explicitly mentioned by Congress which “regarded [them] as so clearly outside the Act that no specific exclusionary provision was found necessary.” Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management. Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy.

The reason managerial employees are exempted from the coverage of the Act is “that employees who exercise discretionary authority on behalf of the employer will not divide their loyalty between employer and union.” Above at 687-688.

While work that is based upon technical and professional competence may necessarily involve the exercise of discretion and judgment, technical and professional employees who exercise such discretion and judgment are not necessarily managerial employees. *General Dynamics Corp.*, 213 NLRB 851, 857-58 (1974). Technical and professional employees are not vested with managerial authority merely by virtue of their status because work performed in that status may have a bearing on the direction of their employer. *Id.* at 858.

The decision as to whether an employee is a manager is made on a case-by case basis depending upon the degree of discretion and authority exercised by the disputed employee. *Drukker Communications, Inc.*, 258 NLRB 734, 743 (1981); *Curtis Industries*, 218 NLRB 1447, 1448 (1975)(dissenting opinion). However, employees do not acquire managerial status by making decisions or exercising discretion “within established limits set by higher management.” *Holly Sugar Corp.*, 193 NLRB 1024, 1026 (1971). Even the authority to exercise considerable discretion does not render an employee managerial where his discretion must conform to an employer’s established policy. *Albert Lea Cooperative Creamery Association*, 119 NLRB 817, 822-23 (1957).

Based on the above and the record as a whole, I find that Port Captains herein, including Captain Chao and Captain Chen, are not managerial employees. Many of the

functions they perform appear to be routine. While they exercise some discretion in the performance of their duties, it is not extensive. Further, their exercise of discretion must conform to the Employer's established policies, including those contained in the Operating Procedures Manual, federal regulations and the requirements of VSAs. The evidence reveals that Port Captains lack the requisite discretion and judgment independent of established policies necessary to confer managerial status upon them. *NLRB v Yeshiva University*, above at 682-83. Additionally, the discretion they exercise is a function of the technical and professional nature of their work, not managerial. *General Dynamics*, above at 857-858. I find no evidence that they formulate the Employer's business policies. See also, *Southwest Airlines Co.*, 239 NLRB 1253 (1979), where decisions made by flight dispatchers, like those made by the Jersey City Port Captains here, were not considered to be managerial decisions.

4. The Appropriateness of a Unit Limited to Jersey City Port Captains

As noted above, while the Petitioner seeks to represent a unit of employees consisting of the Employer's Port Captains in Jersey City, the Employer asserts that that unit is inappropriate and that the only appropriate unit would also include Henry Chen, the Port Captain in Port Elizabeth, since he shares a community of interest with them.

Nothing in the Act requires that the unit for bargaining be the *only appropriate* unit, the ultimate unit or the *most appropriate* unit; the Act requires only that the unit be "*appropriate*," that is, appropriate to insure employees in each case "the fullest freedom in exercising the rights guaranteed by this Act." *Overnite Transportation Co.*, 322 NLRB 723 (1996); *Morand Bros. Beverage Co.*, 91 NLRB 409 (1950), *enfd.* 190 F. 2d 576 (7th Cir. 1951). A union is, therefore, not required to seek representation in the most comprehensive grouping of employees unless "an appropriate unit compatible with that requested does not exist." *P. Ballantine & Sons*, 141 NLRB 1103 (1963); *Bamberger's Paramus*, 151 NLRB 748, 751 (1965). Moreover, it is well settled that there is more than one way in which employees of a given employer may appropriately be grouped for purposes of collective bargaining. See, for example, *General Instrument Corp. v. NLRB*, 319 F. 2d 420, 422-423 (4th Cir. 1963). The presumption is that a single location unit is appropriate. *Hegins Corp.*, 255 NLRB 160 (1981); *Penn Color, Inc.* 249 NLRB 1117 1119 (1980); *Marks Oxygen Co.*, 147 NLRB 228, 230 (1964).

I conclude that there does not exist such a community of interest between the Port Captain in Port Elizabeth and the Port Captains in Jersey City so as to make the unit sought by the Petitioner, which is limited to Jersey City Port Captains, inappropriate. In so concluding, I note that unlike the other Port Captains, Captain Chen has not received a college degree in his field; that he works in a different department at a considerable distance away from them; that Captain Chen and the other Port Captains rarely come into physical contact with each other; that he is separately supervised; that the functions he performs are, for the most part, quite different than those performed by the Jersey City Port Captains; and that although he often works longer hours, he is paid less than they are.

In support of its position that the only appropriate unit would be a combined unit of Jersey City and Port Elizabeth Port Captains, the Employer asserts that the work performed by Chen is functionally integrated and interrelated with the work performed by the Port Captains in Jersey City; that he ensures that the Stowage Plans they create are correctly and efficiently implemented; and that, of necessity, he has substantial contact with them. However, I find that the integration and contact herein is not sufficient to rebut the presumption that the Port Captains at the single location of Jersey City have a separate and distinct community of interest with each other and would constitute an appropriate unit.⁶ Further, the record does not establish that Chen's inclusion in a unit with other Port Captains would be necessary for him to receive any representation, as there is no evidence that he could not appropriately be included in any other unit.

5. Supervisory Status of Port Captain C. Y. Chao

Section 2(11) of the Act defines the term "supervisor" as:

...any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

⁶ Cases cited by the Employer such as *The Boeing Company*, 337 NLRB NO. 24 (2001); *Space Mark, Inc.*, 325 NLRB 1140 (1998); *Johnson Controls, Inc.* 322 NLRB 669 (1996); and *Chromalloy Photographic Industries*, 234 NLRB 1046 (1978) are inapposite. They reflect a greater community of interest among employees in the units

It is well established that an individual need possess only one of the enumerated indicia of authority in order to be encompassed by the definition, as long as the exercise of such authority is carried out in the interest of the employer and requires the exercise of independent judgment. *Big Rivers Electric Corp.*, 266 NLRB380, 382 (1993). Absent detailed evidence of independent judgment, mere inferences or conclusionary statements without supporting evidence are insufficient to establish supervisory status. *Quadrex Environmental Co.*, 308 NLRB 101 (1992); *Sears Roebuck & Co.*, 304 NLRB 193 (1991). The Board takes care not to construe supervisory status too broadly because the employee who is deemed a supervisor loses the protection of the Act. *St. Francis Medical Center-West*, 323 NLRB 1046 (1997). The burden of establishing supervisory status is upon the party asserting that status. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 710 (2001); *Benchmark Mechanical Contractors, Inc.*, 327 NLRB. 829 (1999); *Alois Box Co., Inc.*, 326 NLRB 1177 (1998). Whenever evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established. *Phelps Medical Center*, 295 NLRB 486, 490-91 (1989).

In the instant case, I find that Petitioner has not met its burden of establishing that Port Captain C. Y. Chao is a statutory supervisor. Although Chao's job description indicates that he has certain "supervisory" responsibilities, such is not determinative of his supervisory status. *Bakersfield Californian*, 316 NLRB 1211 (1995); *Connecticut Light & Power Co.*, 121 NLRB 768, 770 (1958). Rather, the question is whether there is evidence that the individual actually possesses any of the powers enumerated in Section 2(11). *Western Union Telegraph Co.*, 242 NLRB 825 at 826 (1979); *Miami Convalescent Home*, 224 NLRB 1271, 1272 (1976). There is no evidence that Chao has the authority to or has fired, transferred, suspended, laid off, recalled, promoted, rewarded, disciplined or adjusted the grievances of any employees or recommended such action. With respect to Chao's having recommended that Captain Hwang be hired and, after completion of his probationary period, be retained, the authority to recommend hiring is insufficient to satisfy the statutory standard for

found appropriate therein due to such factors as greater integration and more contact or interchange than is present between the Port Captains at the Jersey City and Port Elizabeth locations involved herein.

supervisors unless the recommendations are implemented without independent review or evaluation. *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 55 (1999); *Quality Chem., Inc.*, 324 NLRB 328, 330 (1997); *Waverly-Cedar Falls Health Care, Inc.*, 297 NLRB 390 (1989). The record indicates that Chao's recommendations were independently reviewed and approved by higher authorities.

Nor is there evidence that Captain Chao responsibly directs employees under him, who generally appear to work independently of him, although they do occasionally seek his guidance or advice. Additionally, while Captain Chao has approved leaves of absence, there is no showing that his doing so involves the exercise of independent judgment, which would be necessary for it to be considered an indicium of supervisory status. *Tree-Free Fiber Co.*, 328 NLRB 389, 392 (1999); *Chrome Deposit Corp.*, 323 NLRB 961, 964 (1997). Further, although there is evidence that Captain Chao will be expected, in the future, to prepare annual evaluations for some employees in his department, there is no evidence as to what the extent of review will be of the evaluations, whether they have any impact on the employees' job status or whether personnel decisions will be directly affected by them. In the absence of such evidence, the mere anticipation of the preparation of evaluations is insufficient to establish supervisory authority. *Northern Montana Health Care Center*, 324 NLRB 752, 753, n. 11 (1997). Additionally, while Chao fills in occasionally for his supervisor, such instances appear to be infrequent and there is no evidence that Chao has exercised any supervisory authority when this has occurred. Accordingly, I shall include him in the unit found appropriate herein.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the

election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether or not they desire to be represented for collective bargaining purposes by the **International Longshoremen's Association, AFL-CIO**.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters in the unit found appropriate above shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in NLRB Region 22, 20 Washington Place, Fifth Floor, Newark, New Jersey 07102, on or before March 28, 2003. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. The

Board in Washington must receive this request by April 4, 2003 .

Signed at Newark, New Jersey this 21st day of March 2003.

Gary. T. Kendellen
Regional Director
NLRB Region 22
20 Washington Place
Fifth Floor
Newark, New Jersey 07102

177-2401-6700
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